SUPREME COURT, U. S.

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No. 173

In the
Supreme Court of the United States
OCTOBER TERM, 1968

RICHARD E. GORMAN,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR REHEARING

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PETITION FOR REHEARING

Petitioner prays that this Court grant rehearing of its order of October 14, 1968, denying the petition for a writ of certiorari, and that a writ of certiorari issue on the question of:

> Whether, when the Department of Justice has in its possession recordings of a criminal defendant's voice, and others, concerning a criminal defendant's activities obtained through illegal electronic surveillance, the Department may refuse unqualifiedly to disclose the existence and contents of those recordings unless in its discretion, free from judicial control, it determines both that the surveillance is or may be unlawful and that the government has thereby obtained any information which is arguably relevant to the litigation involved.

REASONS FOR GRANTING REHEARING AND ISSUING THE WRIT

This petition has been filed within the time set forth in Rule 58.

The intervening circumstance which warrants rehearing is the Solicitor General's admission to the Court of illegal electronic eavesdropping concerning the petitioner, the disclosure that four "index cards" containing references to electronic surveillance concerning the petitioner are in the possession of the Chicago F.B.I. office; the Department of Justice's insistence that no evidence of electronic surveillance concerning the petitioner has a bearing on his case; and upon its right to refuse disclosure of this electronic surveillance in its discretion, rather than under judicial control.

For the information of the Court, the following is a chronological review of the events pertinent to this petition.

On October 2, 1968, your petitioner directed a demand to the Solicitor General (Appendix A) that a search be made of the Federal Bureau of Investigation files concerning any electronic surveillance of the petitioner as a result of information coming to the petitioner after the petition of certiorari had been filed in this case. On October 24, 1968, ten days after certiorari had been denied, the Solicitor General filed with this Court a Supplemental Memorandum admitting one instance of electronic eavesdropping of the petitioner, stating gratuitously and *ex parte* that the conversation was totally unrelated to the prosecution of the petitioner. On the same date, the petitioner received a telephone communication from the United States Marshal asking that he surrender for

commitment to the custody of the Attorney General. Your petitioner, on the same date, appeared before The Honorable Bernard M. Decker, District Court Judge, and moved for a stay pending a review of the status of his rights in view of the disclosures. At that hearing the United States Attorney stated that he would contact the Department of Justice, secure a copy of the eavesdropping and submit it to the District Court for an *in camera* inspection. The District Court granted a stay until Friday, November 1, 1968.

Your petitioner not knowing what, if anything, would be turned over to him, nor what type or kind of hearing he might receive, and it appearing that the Government was attempting to impose a procedure contrary to this Court's well established findings and directions, *Black* v. *United States,* 385 U.S. 26; *Hoffa* v. *United States,* 387 U.S. 231; *O'Brien* v. *United States,* 386 U.S. 345; *Schipani* v. *United States,* 385 U.S. 372 and *Petition for Rehearing in Alderman No. 133, This Term,* pending now in this Court, caused to be filed in this Court, a pleading entitled Petition for Rehearing and Emergency Motion for Stay of Effectiveness of Order Denying Certiorari.

In this petition, your petitioner also indicated to this Court matters which have recently arisen in the United States District Court for the Northern District of Illinois in two cases, *United States* v. *Fidanzi,* No. 67 CR 561 and *Angelini* v. *Illinois Bell Telephone Company,* No. 68 C 612, in which it was revealed that the Federal Bureau of Investigation maintains what are called "index cards" in the course of electronic surveillances in Chicago, Illinois. It appears that every time a person's name is mentioned in an electronic surveillance whether he is present and speaking or not, or when other persons discuss his activi-

ties, the particular tape, record or log, and the date thereof, is registered on an "index card."

On October 29, 1968, petitioner received a protective order of the District Court together with a three-page document purporting to be a log of the overheard conversation of the petitioner. A copy of the protective Order is attached as Appendix B. Without disclosing the contents of this purported log, your petitioner has attached as Appendix C an affidavit of the pertinent areas that could have a bearing on his case and how the Government might have used it for leads concerning evidence used against him.

On November 1, 1968, your petitioner caused to be served, a Subpoena Duces Tecum to the Special Agent in Charge of the Chicago Office of the Federal Bureau of Investigation (Appendix D) calling for the production of "index cards" relating to electronic or mechanical surveillance of the petitioner. At 2:00 P.M. in the afternoon of the 1st day of November, 1968, your petitioner appeared before the District Court where that Court summarily, without taking evidence or hearing argument, and apparently on the representation of non-materiality by the government ruled the purported log not material to the petitioner's case. Thereupon, the United States Attorney moved for quashal of the Subpoena for the "index cards". The cards, four in number were produced for Court inspection upon request of petitioner, whereupon the Subpoena was ordered quashed and the petitioner was ordered to surrender to the United States Marshal despite a plea to the District Court that a Petition for Stay of Proceedings was pending in this Court. Counsel for petitioner asked the District Court to indicate the number of entries on the 3x5 index cards. The Court refused any hearing on them and would not seal them and make them a part of the record.

On November 2, 1968, Mr. Justice Thurgood Marshall entered an order that the effect of the order denying certiorari in this case be suspended pending disposition of a timely petition for rehearing. Your petitioner is now at large, awaiting further orders and instructions of this Court.

Your petitioner respectfully argues that this policy of self-determination of relevance by the Department of Justice and the failure of the District Court to grant an adversary hearing in which evidence could be produced and the right of cross-examination would be present to explore the use made of the illegally obtained material or the existence of any other conversations that may be shown to have been overheard through unlawful electronic eavesdropping surveillance of the petitioner, or concerning the petitioner, and the relevance of any such conversations to the petitioner's subsequent conviction are contrary and in conflict with the pertinent decisions of this Court.

Counsel for the petitioner are not unfamiliar with the "index cards" produced in the District Court in response to the subpoena. Based on this experience gained in other cases cited *supra* since there are four cards and it is believed there are ten lines on each card, it is estimated that there could be thirty-one entries present relating to electronic surveillance of the petitioner. In making the disclosure of the one instance of illegal electronic eavesdropping, the Department of Justice also chooses not to state whether it is the one which was alluded to by the government's attorney in the Seventh Circuit Court of Appeals (Appendix A) which initiated the petitioner's inquiry to the Solicitor General, or some other eavesdropping. Thus, again, we find the Department of Justice

making grudging piecemeal admissions of the presence of electronic surveillance causing unending litigation to ferret out this illegal evidence-gathering. When the issue is electronic surveillance, and a criminal prosecution, the defendant's need to protect himself and be accorded a full ventilation makes his claim of disclosure upon government files stronger than in any other litigating posture. *Dennis* v. *United States,* 384 U.S. at 872, Note 20.

Petitioner submits that this case presents an urgent need for the exercise of the Court's supervisory power over federal criminal justice including an order setting out the conditions under which electronic surveillance should be disclosed under judicial supervision, and granting the petitioner an opportunity to insure, through adversary litigation that his prosecution was free of all taint from illegal surveillance. Certainly the production of the "index cards" signifies that the interdepartmental intelligence is not always available to all persons making representations to this Court in behalf of the government, this then only magnifies the problem of the defendant who by virtue of a chance discovery of illegal surveillance has the task of seeking a full discovery thrust upon him.

CONCLUSION

For the foregoing reasons, petitioner prays that a rehearing be granted, and that upon the rehearing, a writ of certiorari issue, the judgment be reversed, and the cause remanded for further proceedings.

Respectfully submitted,

ANNA R. LAVIN
EDWARD J. CALIHAN
Attorneys for Petitioner

CERTIFICATE

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and that it is restricted to the grounds specified in Rule 58(2) of the Rules of this Court.

.....
ANNA R. LAVIN

.....
EDWARD J. CALIHAN
Counsel for the Petitioner

Subscribed and Sworn to
before me this 6th day
of November, 1968.

.....
Notary Public